TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS
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File: 5549

APPLICATION FOR SPECIAL PERMISSION

H-225, J. F. Doyle, Agent

To the Interstate Commerce Commission
Washington, DC 20423

J. F. Doyle, Agent for and on behalf of United States railroads (except the Long Island Rail Road Company) respectfully petitions the Interstate Commission under Section 6 of the Interstate Commerce Act, as amended, for authority to depart from the provisions of Tariff Circular 20, so as to publish on statutory notice a Tariff of Increased Rates and Charges containing a conversion table which, if subsequently permitted to take effect, will provide a 10 percent increase on "recyclable" commodities. Connecting supplements will then be issued so as to connect the conversion table to all tariffs containing rates and charges on recyclables.

I

The purpose of this application is to simplify, for both carriers and shippers, the application of a proposed 10 percent increase on recyclable commodities, authority for which was withheld under the order entered by the Commission on June 3, 1974 in Ex Parte No. 305, *Nationwide Increase of Ten Percent In Freight Rates and Charges, 1974.*

Employment of a conversion table to accomplish a widespread adjustment in rates and charges carried in numerous tariff publications is an efficient and clear-cut method of apprising the shipping public of the involved adjust-

ment. The contemplated adjustment in rates and charges on recyclable materials covers a substantial group of diverse commodities, with the basic rates carried in literally hundreds of separate rate tariffs published by agencies and individual lines throughout the United States and Canada. In addition, the contemplated adjustment applies to charges for such services as switching, weighing and transit among others. No reasonably precise estimate of the number of accessorial tariffs applicable within the scope of this adjustment is readily available.

A cursory examination of the situation within Official Territory has been made. If Eastern carriers and their agents must separately amend each individual rate tariff applicable on recyclable materials, in excess of 1,040 tariffs would be involved.

A serious complication, burdensome to shipper and carrier alike, will inevitably arise if it is not possible to accomplish this adjustment by means of a conversion table publication providing for sequential application following Master Tariff X-303. The proposed 10 percent adjustment is to apply to rates and charges increased under the provisions of presently applicable Master Tariffs such as X-299 and X-303. There has ben no final order in Ex Parte 299. Thus, tariff publishers are unable to incorporate the Ex Parte 299 increases in their tariffs (despite the fact that Ex Parte 303 is final).

As a result, unless the Commission is able and willing to grant substantial relief from tariff publishing rules and regulations, the carriers are effectively prevented from implementing the long-overdue adjustment in rates and charges on recyclable materials. Any rule relief accorded would of necessity be complicated and confusing to tariff users. On the other hand, use of a conversion table publication applicable to all existing rates and charges on recyclables will provide an efficient and clear-cut method to accomplish an adjustment of broad and substantial magnitude.

II

A brief description of events preceding the filing of this application should be helpful in understanding the carriers' purpose.

By petition dated April 22, 1974, the nation's railroads, except the Long Island Rail Road, sought authorization from this Commission to increase all freight rates and charges by 10 percent. On June 3, 1974, the Commission issued an appropriate order in Ex Parte No. 305 authorizing implementation of the 10 percent increase on all freight rates and charges except insofar as the increases would apply to the transportation of "recyclables." The order of June 3 withheld any increase in recyclable rates on very specific grounds, to wit:

> "except that in view of the pendency of Ex Parte No. 295 (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials, the said increase is not authorized on the commodities described in paragraph (iii) of the general exceptions to tariff No. X-295-A;" (p. 3)

Pursuant to the authority granted on June 3, the carriers applied the 10 percent increase to all other rates and charges, but no increase was published to apply on recyclables.

On October 29, 1974 the Commission decided the pending Ex Parte 295 (Sub-No. 1) proceeding and authorized therein a 3 percent increase in the rates and charges applying on movements of recyclable commodities. In essence, the condition upon which the Commission has denied relief as to recyclables in its order of June 3, 1974, has been removed.

In these circumstances, the railroads party to the initial petition in Ex Parte 305, excepting the Chessie System and its subsidiaries, filed a petition for authority to amend the Ex Parte 305 master tariff in order to effect as to recyclables the same 10 percent increase which had been approved

six months earlier on all other traffic. This latter petition was filed on December 26, 1974, along with a *Petition for Leave to File* such petition. The procedural *Petition for Leave to File* the substantive petition for authority to amend the Ex Parte 305 tariff was deemed necessary by the petitioners in that more than 30 days had elapsed since the initial Ex Parte 305 order entered on June 3.

On January 13, 1975, the Commission, Division 2, rejected the petition in question as "not timely" in the Ex-Parte 305 proceeding. The rejection was publicized by a *NOTICE* issued in Ex Parte 305 on January 13, 1975. A copy of that Notice is attached hereto as Appendix A.

The reason for rejection, as stated in the Notice, was in obvious error. A procedural petition for leave to file a substantive petition, under the Commission's rules, cannot possibly be held as "not timely". Under Rule 101 of the Commission's Rules of Practice, petitions for reconsideration must generally be filed within 30 days after an order is issued, but Rule 101(e) specifically provides that where good cause is shown, a petition for reconsideration may be filed after the 30-day period. This is in accord with the right granted under Section 17(6) of the Act specifying that any party "may at any time . . . make application for rehearing, reargument or reconsideration . . ." That specific statutory right can be and is limited by Commission regulation to the 30-day period referred to earlier, but, by virtue of both the statute and Rule 101(e), any party is entitled to seek *leave to file* a new petition at any time, and this is generally done through the use of a procedural petition for leave to file the substantive petition. (See, for example, Respondents' Petition for Leave to File Petition for Vacation of Suspension and Petition for Relief, filed September 26, 1968, in Ex Parte No. 259.)

The Commission, of course, may find that the petition seeking such leave does not state "good cause" and there-

upon refuse to consider the accompanying request (petition) for substantive relief, but that is not the case here, and the Commission was completely without authority to reject the petition for procedural relief as "not timely".

III

For reasons not pertinent here and despite the obvious error of Division 2 in rejecting the petition for leave to file a substantive petition as "not timely," petitioners here elected not to seek reconsideration of the rejection. Instead, they chose to follow normal procedures, as suggested in the Notice. The proposal for a 10 percent increase in all rates and charges on recyclables was public docketed by each of the rate bureaus involved, and a public hearing was afforded to all interested shippers on February 11, 1975. Since the proposal would have nationwide application on all recyclable rates, the publication sought was to be effected through a supplement to the Ex Parte No. 305 master tariff.

By letter, dated February 7, 1975, over the signature of the Chief, Section of Tariffs (File 215-56111), Interstate Commerce Commission, the supplement in question was rejected on the ground that the earlier NOTICE issued by Division 2 had denied any authority to proceed in that fashion. There is nothing whatsoever to indicate that the Notice in fact denied such authority. As shown above, the Notice simply—and improperly—rejected the procedural petition as not timely filed.

In any event, the net result is that while the condition upon which the Commission withheld authority to implement the initial X-305 10 percent increase on recyclables was eliminated with the Commission's decision in Ex Parte No. 295 (Sub-No. 1), the carriers since August 29, 1974, have been prevented from the *mere publication* of the 10 percent increase on recyclables through the rather bizarre series of events set forth above.

IV

Under these circumstances, the nation's railroads, except for LIRR, now apply to this Commission for authority to depart from the provisions of Tariff Circular 20 to the extent that the applicants be permitted to *publish* —on not less than statutory notice and subject to protests and petitions for suspension—a 10 percent increase on recyclable commodities by means of a conversion table which will therafter be connected to the existing tariffs containing rates and charges on recyclables.

Unless relief is granted herein, applicants would be totally frustrated in their purpose, not because of the merits of the proposed increase, but by the mechanics of individual tariff adjustment. In the Eastern District alone, there are more than 1,000 separate tariffs containing line-haul rates and switching charges applying on the movement of recyclables, and there is a multitude of tariffs in the same territory which would have to be adjusted to reflect the proposed increase on other accessorial charges, such as weighing, transit, etc. The effort required under these circumstances would be such as to completely defeat these applicants in applying any cross-the-board increase on recyclables for an indeterminate but obviously lengthy future period.

As stated earlier, the relief requested cannot possibly have any adverse effect upon the shipping public. The relief sought is simply in the area of publication. The matter has been public docketed and subjected to a public hearing. The appropriate publication would be filed on statutory notice and subject, of course, to protests and petitions for suspension.

The relief sought herein will have no significant effect upon the environment.

It is our request that this application be granted and notification advice by telephone be given to Mr. Owen Schottinger (AC 212-594-0600).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES ("SCRAP"); ENVIRONMENTAL DEFENSE FUND; NATIONAL PARKS AND CONSERVATION ASSOCIATION; AND IZAAK WALTON LEAGUE OF AMERICA ("EDF, *et al.*"); INSTITUTE OF SCRAP IRON AND STEEL ("ISIS"); AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES ("NARI"),

Appellees

On Appeal from the United States District Court for the District of Columbia

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SUGGESTION OF MOOTNESS BY APPELLEES SCRAP AND EDF, *ET AL.*

I.

At oral argument of this case, on March 26, 1975, counsel for the United States and the Interstate Commerce

Commission made a statement which, if correct, means that this case is moot.

The statement in question pertains to the practical meaning of the lower court's judgment. That judgment "vacated" orders entered by the ICC in *Ex Parte 281*, a general revenue proceeding, and remanded the case "to the Commission for further proceedings consistent with the opinion in this case" (Gov.J.S., p. 2b), *i.e.*, for "reconsideration of the rate increases" approved in *Ex Parte 281*. 371 F.Supp. at 1308, n. 50.

At oral argument, counsel for the Government asserted (Tr., p. 30) that if the Commission is "ordered back to reopen this proceeding" (*i.e.*, if the lower court's judgment is affirmed), then "what the Commission will have to do" is to reconsider the following questions: (a) "*did* the railroads need increased revenue *way back when*," at the time of the Commission's orders in *Ex Parte 281*, and (b) "*did* that action [the orders in *Ex Parte 281*] have an effect on the environment?" Counsel for the Government specifically distinguished question (b) from the question, "*will* this action have an effect on the environment?" (Emphases added.)

If the Commission is correct that the lower court's judgment requires a re-examination of the rate increases approved in *Ex Parte 281* in light of the facts as they stood "way back when," rather than the facts as they stand now, then this case is clearly moot. Since *Ex Parte 281* the Commission has issued a series of subsequent general revenue orders which have radically changed not only the maximum permitted rates on particular commodities, but also the relationship between rates for scrap and primary materials.[1]

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[1] No one claims, of course, that the lower court's judgment has had the slightest effect on these subsequent general revenue orders, or on the Railroads' collection of any rates authorized thereby.

The most significant of these subsequent general revenue orders is the one in *Ex Parte 310*, which the Commission served on March 25, 1975, just one day before oral argument of this case in the Supreme Court. In *Ex Parte 310* the Commission permitted *no* rate increases on non-ferrous scrap, and imposed the full "hold down" on ferrous scrap which was requested by the appellee Institute of Scrap Iron and Steel. At the same time, the Commission allowed a 7 percent increase on rates for primary commodities.[2] The Commission's rationale for thus favoring recyclables was that "the best information before us indicates that the recycling industry is suffering greatly from the nation's economic downturn," [3] that "we know of no industry which has experienced greater decreases in prices of its products," [4] and that "it remains a basic economic fact that not granting a proposed rate increase for recyclables will generate a degree of positive environmental benefit." [5]

If the rates in effect immediately *prior* to *Ex Parte 281* are taken to be 100, then the rates in effect immediately *subsequent* to *Ex Parte 310* are approximately as follows:

Primary commodities:	140
Ferrous scrap:	120
Non-ferrous scrap:	117

In other words, since *Ex Parte 281*, freight rates on primary commodities have increased approximately 40

[2] This 7 percent increase is equivalent to approximately 10 percent of the rates in effect immediately prior to the Commission's orders in *Ex Parte 281*.

[3] Ex Parte No. 310, Increased Freight Rates and Charges, 1975, Nationwide, p. 37. (Copies of this order have been lodged with the Court.)

[4] *Id.*, p. 38.

[5] *Id.*, p. 39.

percent, while freight rates on recyclables have increased only half as much.

In view of these wholly changed circumstances, it is plain that a purely historical study of whether "the railroads need[ed] increased revenue *way back when*," or of whether the Commission's orders in *Ex Parte 281* "*did* . . . have an effect on the environment" [6] would be a pointless academic exercise. At this late date, such an historical study could not serve as the basis for the Commission's granting any present relief to the appellees in this case or to anyone else.

In short, either the Commission has wholly misconstrued the judgment from which it appeals, or this aspect of the case is moot.

II.

The remaining aspect of the lower court's judgment—its "vacating" of the Commission's orders in *Ex Parte 281*—is plainly without even potential practical effect. The lower court, to be sure, stated that:

> "The only consequence of our vacating the Commission's orders [in *Ex Parte 281*] pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade . . . 412 U.S. [800] at 818. . . ." 371 F.Supp. at 1308, n. 50.

But we are now persuaded that the lower court's "vacating" of the Commission's orders lacked even the limited, contingent effect which the lower court ascribed to it. As we pointed out at oral argument (Tr., pp. 39-

[6] Tr., p. 30 (emphases added).

41) the key to the puzzle is that the Commission never made a finding in *Ex Parte 281* that any particular rate or group of rates was just and reasonable. Rather, the Commission specifically stated that it did *not* make such a finding. (Gov.J.S., pp. 38d-39d.) Thus the actual effect of the lower court's "vacating" the Commission's orders is that in hypothetical "subsequent proceedings" which may never in fact occur, the Railroads would be unable to make an argument *which they could not make in any event, for reasons wholly apart from the lower court's judgment.*[7]

III.

If the Commission is indeed correct in its reading of the lower court's judgment, and if neither of the two aspects of this judgment, as just described, can lead to any practical consequence or to any present relief, then we fail to see what saves this case from mootness. Should this case be found moot, either by this Court, or by the lower court upon a remand for a determination as to mootness,[8] then we, of course, would agree with the appellant Railroads as to the proper disposition of the case. (See R.R.Reply Br., pp. 4-5.) If a finding of mootness is made by this Court, rather than the lower

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[7] In two highly ambiguous footnotes (Gov. Br., p. 5, n. 4; Gov. Reply Br., p. 2, n. 1) the Commission has asserted that a general revenue order has the effect of "shift[ing] the burden of proof" in possible "future proceedings." It appears that this is so only in the sense that such an order terminates the general revenue proceeding (in which the *carriers* always have the burden of proving a need for increased revenues), and leaves further disputes about particular increased rates to reparation proceedings under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1) (in which the *shippers* always have the burden of proving the illegality of challenged rates). "Vacating" a general revenue order does not mean, as one might infer from these footnotes, that the burden of proof is shifted to the carriers in subsequent § 13(1) proceedings, if any.

[8] *See, e.g., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973); *Johnson* v. *New York State Education Dep't*, 409 U.S. 75 (1972).

court, this Court should "reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

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